Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1936

ANTONIO MARENO, Jr., a minor 16 years of age, by his mother and next friend, Kathlene C. Mareno,

Petitioner,

vs.

JAMES M. WALKER, individually and as Principal of Lakeland Senior High School, Shrub Oak, New York, and ROBERT F. WILLIS, individually and as a Substitute Homeroom Teacher in Lakeland Senior High School, Shrub Oak, New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1979

ANTONIO MARENO, Jr., a minor 16 years of age, by his mother and next friend, Kathlene C. Mareno,

Petitioner,

v.

JAMES M. WALKER, individually and as Principal of Lakeland Senior High School, Shrub Oak, New York, and ROBERT F. WILLIS, individually and as a Substitute Homeroom Teacher in Lakeland Senior High School, Shrub Oak, New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Antonio Mareno, Jr., a minor 16 years of age, by his mother and next friend, Kathlene C. Mareno, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 26, 1980.

OPINION BELOW

The judgment of the court of appeals, rendered on the opinion of the district court, affirmed the judgment of

the United States District Court for the Southern District of New York (Lawrence W. Pierce), entered November 14, 1979, which summarily dismissed prior to trial the complaint in petitioner's civil rights action brought against respondents high school principal and teacher, respectively, and said judgment of affirmance is unreported. The opinion of the district court judge is also unreported, is the only written opinion rendered in the case, and is reproduced in Appendix A to this petition. The judgment of the district court is reproduced in Appendix B to this petition; and the judgment of the court of appeals is reproduced in Appendix C to this petition.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1980. The jurisdiction of this court is invoked under Title 28, United States Code, section 1254.

QUESTIONS PRESENTED

1. Was the court of appeals judgment compatible with the most favorable inferences which could be drawn in petitioner's favor from the evidence presented on respondents' motion for summary judgment?

2. Does the Second Circuit's reliance upon *Chaplinsky* as a basis for rejecting petitioner's claims for first amendment protection arising from petitioner's *reactionary* utterance warrant review by this court in the light of the Fourth Circuit's contrary holding which extends first amendment protection to a student's *aggressive* expression upon the authority of *Tinker* and its progeny?

AUTHORITIES INVOLVED

Question No. 1 involves Rule 19-1.(b) of this court's rules, and *Adickes v. Kress & Co.*, 398 U.S. 144 (1970). Rule 19-1.(b) provides for review by this court on certiorari:

> Where a court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

Question No. 2 involves Rule 19-1.(b) of this court's rules, and *Thonen v. Jenkins,* 491 F.2d 722 (4th Cir., 1973). Rule 19-1.(b) provides for review by this court on certiorari:

> Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter . . .

Included here is the first amendment freedom of speech guarantee in the Constitution of the United States as applied to the states through the fourteenth amendment to the constitution.

The first amendment (ARTICLE I) states in relevant part:

> Congress shall make no law . . . abridging the freedom of speech. . . .

The fourteenth amendment (ARTICLE XIV, Section I) states in relevant part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . .

Freedom of speech is one of the privileges of United States citizenship which is protected against state infringement by the federal constitution.

STATEMENT OF THE CASE[1]

Petitioner, a United States citizen by birth (46) and a 16 year old sophomore student in Lakeland Senior High School in Shrub Oak, New York, was suspended from school by the Dean of Men for 1 day for uttering the word "Prick" in the hallway outside his homeroom classroom after a male substitute teacher deliberately slammed the classroom door shut in petitioner's face, nearly catching his hand in the door as it slammed shut (34, 41). The teacher, upon overhearing the utterance which was made in half voice in an empty hallway and not actually intended for his hearing, reopened the classroom door, and threatened to inflict bodily harm upon petitioner if petitioner ever called him that again (41-42).[2]

The principal, to whom the dean referred the disciplinary matter that was initiated on complaint of the teacher at the end of the homeroom period that day, upheld the suspension after merely satisfying himself through unilateral inquiry of petitioner, that petitioner did, in fact, utter the word "Prick" in the hallway outside the homeroom classroom, and although petitioner inform-

1. Reference numbers in parentheses are to the Joint Appendix on the appeal to the Court of Appeals.

2. It is this threat which forms the basis of the second count in the complaint against respondent teacher for imposition of a prior restraint on speech against petitioner, in view of the teacher's deliberate provocation of the utterance in the first place. The count is based upon the observations of a student in the classroom who saw the teacher slam the door on petitioner, and then stand by it prior to reopening it (47-48), thus placing himself in a position to monitor petitioner's verbal reaction.

ed him of the provocative circumstances giving rise to the utterance (26-27, 45). At the time neither the principal nor the teacher were aware of multiple meanings ascribed to the word "Prick," under one of which the word means "a disagreeable or contemptible person" (30).

When the principal failed to address the teacher's rude behavior which triggered petitioner's utterance (27, 35), and it was subsequently discovered by petitioner's father that the principal and the teacher shared an ongoing social relationship at the time of the suspension inquiry (33, 40), petitioner instituted a civil action in the district court under Title 42, United States Code, section 1983, against the principal and the teacher seeking multiple relief for infringement of speech (1-9).

The district court dismissed the two count complaint on defendants' motion for summary judgment, finding as facts that petitioner uttered the word "prick" because the *teacher refused to let him into the homeroom* without a late pass, that *petitioner intentionally directed the utterance* at the teacher, that the teacher abruptly closed the door *behind* petitioner, and that the teacher *reprimanded* petitioner upon overhearing the utterance (48-49). And on these factual findings the district court concluded that petitioner's utterance was not constitutionally protected from infringement because it was abusive language which tended to incite an immediate breach of the peace, that the discipline administered to petitioner did not rise to the level of violating specific guarantees, and that petitioner was disciplined for "insolence" and not for the purpose of curtailment of speech (50-51).

The court of appeals affirmed on the opinion of the district court.

REASONS FOR GRANTING THE WRIT

1. On a motion for summary judgment the court must accord the party against whom the motion is made the most favorable inferences which can be drawn from the facts presented in support of the motion. Although the *Fenton* case on which the district court relied applied this principle in part in finding the student to be the aggressor in his utterance of the word "prick," the district court in petitioner's case wholly failed to apply this fundamental principle, and in fact, found facts which were contrary to the uncontroverted evidence presented on the motion. The Second Circuit, although compelled by this court's ruling in *Adickes* as well as by its own precedents established subsequent to *Adickes* to reverse the district court by reason of its failure to apply the most favorable inference rule, adopted the district court's findings of fact, and affirmed the judgment of dismissal without an opinion. This action on the part of the Second Circuit is clearly contrary to this court's mandate to the Second Circuit in *Adickes.*

2. The Second Circuit's rejection of first amendment protection for petitioner's alleged abusive utterance does not square with the Fourth Circuit's recognition of first amendment protection to a student's admittedly vulgar expression in *Thonen* accorded by both the district court and the court of appeals there, and under less compelling circumstances than those which gave rise to petitioner's utterance. Both the district court and the Second Circuit misapply the doctrine of *Chaplinsky* to the operative facts in this case. Consequently, clarification of the circumstances in which *Chaplinsky* is applicable is warranted by this court in view of the lack of reference to *Chaplinsky* in *Thonen* under essentially the same circumstances as are found in this case.

ARGUMENTS

1. In his brief before the Second Circuit petitioner's primary argument was that significant factual findings made by the district court were not supported by the evidence. Respondents made the motion for summary judgment in an extraordinary manner, namely, without any evidentiary support from the substitute homeroom teacher who did not file any affidavit in support of the motion. The only relevant evidence presented by the respondents consisted of excerpts from petitioner's deposition, by means of which they attempted to convey to the court the impression that petitioner offered no explanation as to why he uttered the word "prick," referring to the deposition at (18). However, arrayed against this solitary reference was yet another reference in the deposition, although not mentioned by respondents, in which petitioner at (19) indicated that he used the word because respondent Willis slammed the door in his face and almost caught his hand in the door.

From this point the evidence only improves from petitioner's viewpoint, consisting of corroborating affidavits from petitioner (41) and a student witness in the homeroom (47), and an affidavit from petitioner's father based upon his questioning of the substitute homeroom teacher at a conference in the principal's office (29)—all submitted in opposition to the motion and in support of complaint allegations that the word "Prick" had been uttered by petitioner out of shock and anger at having the door slammed in his face by respondent teacher to the point of nearly catching his hand in the door (3-4).

Notwithstanding this evidence, the district court found as fact, among other things, that petitioner uttered the word "prick" because he was annoyed that the respondent teacher had refused to let him into the homeroom without a pass (48-49), and that the teacher had only

abruptly closed the door *behind* petitioner (48-49). And, with this inaccurate judicial assessment of the motion evidence, petitioner's role was changed from that of a *victim of agression* to that of an *aggressor.* It is one thing for petitioner to have uttered an objurgation out of anger at having a door slammed in his face which nearly injured him—a tragically human posture. It is quite another thing, however, for petitioner to have uttered the same objurgation only because the teacher refused him admittance into the classroom. As petitioner's counsel was quick to point out to the Second Circuit in his opening statements on oral argument, if it was a case of petitioner reacting because he was refused admittance to the classroom, petitioner would not be in court today (March 25, 1980).

The endorsement of the district court's imprecise factual findings by the Second Circuit in petitioner's case is uncharacteristic of that court upon a plenary evidentiary record. See *Russo v. Central Sch. Dist. No. 1, Towns of Rush, Etc., N.Y.,* 469 F.2d 623 (2nd Cir., 1972), cert. den., 411 U.S. 932 (1973). As Chief Judge Kaufman said in *Russo, supra,* at pages 628 and 629:

> ". . . The need for precision and clarity in fact-finding and the use of cold conclusory statements as a shield to prevent penetrating the absence of facts is made more significant because of the 'clearly erroneous' standard, for while errors of law are always correctable by an appellate court, errors of fact rarely are, unless an appellant can scale the high wall which that standard places before him. It stands to reason that unless due care is given to the process of fact finding, the reliability of the district court's conclusions will be subject to question, thus compelling a reviewing court to scrutinize the findings with a sharper eye than is ordinarily appropriate."

The Second Circuit obviously did not follow, in petitioner's case, its own counsel as set out above in *Russo.*

Moreover, on motions for summary judgment this court has expressly disapproved of the Second Circuit's practice in affirming a district court judgment which does not accord the party against whom the motion is made the most favorable inferences which can be drawn from the moving party's evidence. See *Adickes v. Kress & Co.,* 398 U. S. 144, 157 (1970).

Further, in the wake of *Adickes,* the Second Circuit has ruled that where, as in petitioner's case, the factual allegations in the pleadings of the party opposing summary judgment are supported by affidavits or other evidentiary material they must be taken as true in ruling on the motion. See *First National Bank of Cincinnati v. Pepper,* 454 F.2d 626, 629 (2nd Cir., 1972).

In the light of these holdings, there is no justification for the action of the Second Circuit in not reversing the district court's factual findings in this case.

THE IMPACT OF *ADICKES* ON THE SECOND CIRCUIT PANEL

The Second Circuit met the evidentiary question presented in petitioner's brief by avoiding it, and thus dodged the bullet which the case presented. Scarcely had petitioner's counsel opened his oral argument on the evidentiary question when the Chief Judge commenced the court's questioning of counsel about other aspects of the case at the conclusion of which he announced that petitioner's argument time was up. Thus, counsel never got the opportunity on oral argument to drive home the impact of *Adickes* on the case.

This is not to say, however, that the rule in *Adickes* was not on the minds of this particular Second Circuit panel on March 25, 1980, the day assigned for oral argument in petitioner's case. Petitioner believes *Adickes* was on the panel's minds, if only in connection with *Rodriguez v. Board of Education of Eastchester Union Free School District,* No. 954, which was argued before the same panel on March 26, 1980, the same day that the panel handed down its judgment of affirmance in petitioner's case.[3]

Rodriguez involved a civil rights action under Title VII of the 1964 Civil Rights Act in which the teacher *Rodriguez* charged the Board of Education with sex discrimination in its job transfer practices and sought injunctive relief to bar her transfer. *Rodriguez* moved for an injunction *pendente lite* in the district court and the defendants moved for dismissal for failure to state a claim. The district court ultimately denied plaintiff's motion and granted defendants' motion. In reversing, the Second Circuit (Kaufman, Ch. J.) said (p. 2706):

> ". . . In granting this motion, the district judge stated that he was acting pursuant to Fed. R. Civ. P. 12(b)(6). Nevertheless, his extensive reliance upon facts *de hors* the pleadings presented in connection with the preliminary injunction motion, had the effect of making his disposition, at least in part, as one granting summary judgment for defendants pursuant to Fed. R. Civ. P. 12(c), 56. Because of the court's ac-

3. In assigning 10 minutes for oral argument the clerk informed petitioner in writing that the court reads the briefs in advance prior to alloting argument time. Since this case and the *Rodriguez* case were assigned to the same panel petitioner has to assume that the panel was familiar with the facts in both cases prior to oral argument in either. The evasive posture of the panel on the evidentiary question in petitioner's case counseled petitioner to forego rehearing as being a likely exercise in futility, and to await the panel's ruling on the evidentiary question in *Rodriguez* which occurred on May 2, 1980, and is reported in 616 F.2d 2701 (2nd Cir., 1980).

tion, the judge was required to draw all reasonable inferences and resolve all genuine disputes in favor of the plaintiff.

It is clear from the foregoing that the panel was well aware of this court's holding in *Adickes,* and chose not to apply it in petitioner's case which did involve summary judgment, while electing to apply the rule in *Rodriguez* which did not involve summary judgment. The Second Circuit is not empowered to pick and choose the cases in which it will apply controlling precedents of this court, and thus employ a double standard for evaluating evidence in cases.

The Second Circuit's disposition of petitioner's case represents an affront to the authority of this court which clearly justifies this court's intervention as prayed for herein in the exercise of the court's supervisory power. Uneven handed administration of justice has no place in our society which has chosen to govern itself by the rule of law in preference to the rule of men.

2. The disposition of petitioner's case by the Second Circuit is significant for that which does not appear in the endorsed opinion of the district court judge, namely, the Chief Judge's preoccupation with *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942) during oral argument from which he read *verbatim* almost the same text as appears in a dissenting opinion in *Papish v. University of Missouri Curators,* 410 U.S. 667 (1973), at page 676. The court left no doubt in counsel's mind that the panel was of the opinion that petitioner's utterance must survive the *Chaplinsky* test in order to pass muster as speech. And, in the light of the panel's disposition of petitioner's case, it is clear that petitioner's utterance did not pass the *Chaplinsky* test in the panel's view.

Set against this regressive perspective of the Second Circuit is the Fourth Circuit's holding in *Thonen v. Jenkins,* 491 F.2d 722 (4th Cir., 1973), which follows this court's holding in *Papish* wherein *Tinker v. Des Moines Independent School District,* 393 U.S. 503 (1969), is cited at pages 670 for the proposition that "state colleges and universities are not enclaves immune from the sweep of the First Amendment."

In *Thonen* the Fourth Circuit affirmed the district court's finding that disciplinary action against a student author and a student editor of a campus newspaper for the use and publication, respectively, of a vulgar word addressed to a university president in an open letter discussing parietal regulations infringed the students' First Amendment speech rights. *Chaplinsky* was not discussed or even cited in the Fourth Circuit's opinion in the case, although the factual circumstances for its discussion were more compelling than those underlying petitioner's case.

The *Chaplinsky* perspective shifts the battle for speech rights from the educational environment to the societal environment at large where even the most recent holding of the Second Circuit recognizes that a student's normally restricted speech rights are enlarged. See *Thomas v. Board of Ed., Granville Cent. Sch. Dist.,* 607 F.2d 1043 (2nd Cir., 1979), cert. den., 48 L. W. 3536 (2/19/80), which in and of itself should have served as a deterrent to the Second Circuit's endorsement of a lower court opinion following *Fenton v. Stear,* 423 F. Supp. 767 (W.D. Pa., 1976) as its role model. Any other view of the matter would enable school administrators and teachers to enjoy the best of both worlds while compelling the student to wage battle on two fronts for vindication of his speech rights.

The fallacy of applying *Chaplinsky* in the educational environment is demonstrated in *Fenton v. Stear, supra.* The *Fenton* court, while professing to accord the student

Fenton the most favorable inferences which could be drawn from the evidence (in deference to *Adickes*), nevertheless, accorded the student the least favorable inference which could be drawn from his use of the word "prick" in the sentence "He's a prick." The *Fenton* court, like the district court in petitioner's case, assumed that the word "prick" was used in a vulgar sense even though there was no evidence of anatomical reference associated with its use.

But even the *Fenton* court realized the difficulties of sustaining a successful criminal prosecution of the student in the *Chaplinsky* context. The *Fenton* court said (p. 771):

> However, it is doubtful, as plaintiff would have us hold that Mr. Stear, instead of complaining to the principal of the high school, was obliged to seek his remedy under the criminal or civil law, for it seems that announcing to a companion in a voice overheard by Stear "He's a prick" could possibly be deemed *de minimus* by a state criminal court, 18 C.P.S.A. section 312, or civil court. Perhaps many persons would have ignored the insulting remark, but whether or not it should have been ignored is not a matter of concern to a federal court.

And the *Fenton* court went on to cite *Chaplinsky* for the proposition that insulting or fighting words uttered in a public place are not protected speech.

The truth of the matter is that federal courts must be concerned with how state courts regard objurgatory expression. *Gooding v. Wilson,* 405 U.S. 518, 520 (1972). In *Chaplinsky* this court's decision was influenced by the fact that the highest court in the State of New Hampshire had authoritatively construed the utterances to be offensive as libelous within the meaning of the state statute.

To petitioner's knowledge the courts in New York have not construed the word "prick." Yet, in *People v. Brown,* 60 Misc. 2d 696 (1969), 303 N.Y.S.2d 981, the court held that the word "Jackass" yelled in objurgatory context across a public street to a policeman by the defendant observing his mistreatment of a prisoner did not constitute abusive language under the circumstances within the statutory definition of the criminal offense of harassment in section 240.25 of the New York Penal Law.[4] And, in *People v. Benders,* 63 Misc 2d 572 (1970), 312 N.Y.S.2d 603, citing *Chaplinsky,* among other cases, the court held that a fleeting obscene word and gesture directed to a policeman by a student to express a momentary, emotional reaction of displeasure or dissatisfaction or complaint, even if unjustified, was insufficient for conviction of the student under section 240.25.

In petitioner's case, in addition to the *Fenton* misgivings relative to the public utterance of the word "prick," there is an extension of the colloquy between the respondent principal and petitioner's father over what would be an adult response to the respondent teacher's precipitous behavior (27). It was subsequently brought to the respondent principal's attention that one adult (who happened to be a sitting federal judge) did not think petitioner's utterance to be a strong enough objurgatory response. He said, "He (the teacher) should have been called worse" (35).

The fact of the matter is that the word "prick" which was uttered in half voice by petitioner in an anticipated zone of privacy, namely, the solitude of the empty hallway (41), has no less than seven (7) meanings in common usage

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4. "A person is guilty of harassment when, with intent to harass, annoy or alarm another person: *** 2. In a public place, he uses abusive or obscene language, or makes an obscene gesture . . . " 39 McKinney's Consolidated Laws of New York, section 240.25 (section 240.25, Penal Law).

according to the lexicons, only one of which can be deemed vulgar. In the context in which it was used by petitioner, it simply had reference to "a disagreeable or contemptible person"—a context which aptly described the character of respondent teacher's anti-social behavior toward petitioner in the same time frame. See Webster's Third New International Dictionary (1966 edition), page 1799; Webster's New Collegiate Dictionary (1956 edition), page 681, under the synonyms for the word "provoke."

If the test as enunciated in *Chaplinsky* is what men of common intelligence would understand would be words likely to provoke a fight, rather than what any particular person understands such words to mean, then it is clear in petitioner's case that the offense is only in the eye of the beholder. And petitioner should not have to bear the burden of respondents' ignorance. It is doubtful that the words this court had in mind in *Chaplinsky* possess such linguistic versatility or enrichment and cognitive value as does the word which led to petitioner's suspension.

Thus, in the context of this case the New York Court of Appeals would be hard pressed to find a reference to *persona-non-grata* to be offensive language within the ambit of section 240.25. At most, petitioner's utterance would likely be treated by that court as a private, objurgatory expression overheard only by a person as to whom the utterance could not be deemed abusive or obscene. *Cf. People v. Chesnick,* 302 N.Y. 58 (1950), 96 N.E.2d 87; *People v. Pritchard,* 27 N.Y.2d 246 (1970), 265 N.E.2d 532.

On the facts in petitioner's case the Second Circuit's preoccupation with *Chaplinsky* is misplaced. As applied here *Chaplinsky* collides head on with the doctrine enunciated in *Monroe v. Pape,* 365 U.S. 167 (1961), to the effect that a person is responsible for the consequences naturally flowing from his own actions. Thus, the

emergence of *Chaplinsky* in this context has to have a "chilling" effect on speech inasmuch as it would virtually forbid a student to be a "private" critic of his adult tormentor. A First Amendment guarantee so construed without breathing room will inevitably lead to the school house becoming a citadel of privilege for maladjusted teachers and administrators to intimidate students at will and choke off their legitimate outcry against abuse, and thereby retard or inhibit reform.

In view of the Fourth Circuit's rejection of *Chaplinsky's* relevance in *Thonen,* the Second Circuit's courting of *Chaplinsky* here is important because it represents the nearest any court has come to sanctioning the monitoring and regulation of student "thought." And, in the light of the Lakeland Dean's guarded confirmation of the respondent teacher's proclivities as a provocateur and bully of students (31, 36), this court is urged to consider to what extent, if any, *Chaplinsky* should invade the school house and be a force for restraint of student expression in addition to those restraints already imposed on students under *Tinker.*[5]

5. It is to be noted that under the Lakeland School District regulations applicable here disciplinary action against students, in recognition of the *Tinker* sanctions (38, 39), is not mandatory for their use of profane or abusive language. The regulation states (39), "Some other acts for which suspension would be considered are: *** 6. Profanity or abusive language."

CONCLUSION

For the reasons asserted herein petitioner's application for a Writ of Certiorari should be granted by the court.

Respectfully submitted,

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June, 1980

APPENDIX A
OPINION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTONIO MARENO, JR.,

Plaintiff,

v.

JAMES M. WALKER, et al.,

Defendants.

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LAWRENCE W. PIERCE, D.J.

OPINION AND ORDER

This is a civil rights action commenced pursuant to section 1983 of Title 42, United States Code. Plaintiff Antonio Mareno, Jr., by his mother Kathlene C. Mareno, contends that defendants James M. Walker and Robert F. Willis infringed his constitutional right of free speech. He seeks declaratory and injunctive relief as well as monetary damages from these defendants. Defendants have moved for summary judgment. For the reasons that follow, the motion is granted.

The essential facts involved in this action are not in dispute. Plaintiff, a student at Lakeland Senior High School in Shrub Oak, New York, arrived late at school on the morning of January 15, 1979. He went directly to his homeroom class, but was refused admittance at the classroom doorway by defendant Willis who is a member of the school's faculty. Willis directed him to obtain a tardy pass from the school's principal, defendant Walker. Willis then abruptly closed the classroom door behind the plaintiff.

Annoyed by this apparent affront, plaintiff uttered the word "prick" as he started to walk toward the principal's office. There is little doubt that plaintiff intended to direct that utterance to defendant Willis. Willis overheard the comment and called plaintiff back and verbally reprimanded him. Plaintiff subsequently went to the principal's office and secured the required pass. He was then admitted to his homeroom class.

At the conclusion of the class, plaintiff was escorted by Willis to the principal's office. Disciplinary proceedings were commenced against plaintiff at the insistence of defendant Willis. Plaintiff was ultimately suspended from school by defendant Walker, the principal, for one day on the ground that plaintiff had used language which violated the school's rule barring the use

of profane or abusive language in school. The suspension was noted on plaintiff's school record.

Plaintiff contends that his use of the word "prick" in this instance was not subordination nor disorderliness and that he should not have been subjected to discipline. He contends that his utterance was appropriate under the circumstances and protected under the First Amendment to the United States Constitution. The defendants by their actions, he argues, violated his constitutional right of free speech by their actions.

The Court does not agree. The constitutional right of free speech is not an unfettered right. For example, abusive language which inflicts injury or which tends to incite an immediate breach of the peace is not within the scope of the First Amendment. *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942). More importantly here, however, although an individual's constitutional rights are secured on campus as well as off, "[c]ourts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not *directly* and *sharply* implicate basic constitutional values." *Epperson v. Arkansas,* 393 U.S. 97, 104 (1968) (emphasis added). Therefore, mere disciplinary acts of a school administrator or faculty member are not matters for a federal court's review absent evidence of conduct which rises to the level of violation of specific constitutional guarantees. These limitations on federal court review apply to civil rights actions under section 1983. *Wood v. Strickland,* 420 U.S. 308, 326 (1975).

The Court finds that plaintiff's claims only incidentally involve plaintiff's constitutional right of free speech, if at all. The undisputed facts indicate that plaintiff was being disciplined for his insolence and not for the purpose of curtailing his right of free speech. Furthermore, the plaintiff's utterance was not within the ambit of the First Amendment, but rather was speech in the nature of

fighting words, or lewd, obscene or profane and in the context of its use by the plaintiff, is not constitutionally protected speech. *Fenton v. Stear,* 423 F. Supp. 767, 771 (W.D. Pa. 1976). Since plaintiff's utterance, under the circumstances, was not constitutionally protected and since the undisputed facts otherwise fail to support a claim for infringement of civil rights under section 1983, the defendants' motion for summary judgment is hereby granted.

SO ORDERED.

Dated: New York, New York
November 2, 1979

LAWRENCE W. PIERCE
U.S.D.J.

APPENDIX B
JUDGMENT OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTONIO MARENO, JR.,

Plaintiff,

-against-

JAMES M. WALKER, et al.,

Defendants.

Defendants having moved the Court for summary judgment, pursuant to Rule 56, of the Federal Rules of Civil Procedure, and the said motion having come on before the Honorable Lawrence W. Pierce, United States District Judge, and the Court thereafter on November 8, 1979, having handed down its opinion granting the said motion, it is,

ORDERED, ADJUDGED and DECREED: That the complaint be and it is hereby dismissed.

Dated: New York, N.Y.
November 14, 1979

s/Raymond F. Bunghardt
Clerk

APPENDIX C
JUDGMENT OF THE COURT OF APPEALS

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth dayof March one thousand nine hundred and eighty.

Present:

HONORABLE IRVING R. KAUFMAN, Chief Judge.
HONORABLE THOMAS J. MESKILL, Circuit Judge.
HONORABLE CHARLES L. BRIEANT, JR.,
District Judge sitting by designation

ANTONIO MARENO, JR., a minor 16 years of age,
by his mother and next friend,
KATHLENE C. MARENO,

Plaintiff-Appellant,

v.

JAMES M. WALKER, individually and as Principal of Lakeland Senior High School, Shrub Oak, New York, and ROBERT F. WILLIS, individually and as a Substitute Homeroom Teacher in Lakeland Senior High School, Shrub Oak, New York,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the opinion of Judge Pierce.

s/Irving R. Kaufman
IRVING R. KAUFMAN, Chief Judge

s/Thomas J. Meskill
Thomas J. Meskill, Circuit Judge

s/Charles L. Brieant, Jr.
CHARLES L. BRIEANT, JR.
District Judge

Supreme Court, U. S.
FILED
JUN 26 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979
No. 79-1936

ANTONIO MARENO, JR., A MINOR OF 16 YEARS OF AGE BY HIS MOTHER AND NEXT FRIEND, KATHLENE C. MARENO,

Petitioner,

VS.

JAMES W. WALKER, INDIVIDUALLY AND AS PRINCIPAL OF LAKELAND SENIOR HIGH SCHOOL, SHRUB OAK, NEW YORK, AND ROBERT F. WILLIS, INDIVIDUALLY AND AS A SUBSTITUTE HOMEROOM TEACHER IN LAKELAND SENIOR HIGH SCHOOL, SHRUB OAK, NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1979

ANTONIO MARENO, Jr., a minor 16 years of age, by his mother and next friend, Kathlene C. Mareno,

Petitioner,

vs.

JAMES M. WALKER, individually and as Principal of Lakeland Senior High School, Shrub Oak, New York, and ROBERT F. WILLIS, individually and as a Substitute Homeroom Teacher in Lakeland Senior High School, Shrub Oak, New York,

Respondents.

QUESTION PRESENTED

The sole question on this appeal is:

Whether the suspension of a second year high school student from class for one day, pursuant to the express regulations of the Board of Education of the school and the New York Education Law, for calling his teacher a "prick" on school premises "rose to the level of a violation of a specific constitutional guarantee," so as to create a cause of action under 42 U.S.C.

§1983.

The petitioner's "Questions Presented" are spurious and have no relation to the facts or the decisions below.

STATEMENT OF THE CASE

The judgment sought to be reviewed affirmed a summary judgment of the United States District Court for the Southern District of New York against the petitioner, a high school sophomore, in an action brought by him against his principal and homeroom teacher, purportedly pursuant to 42 U.S.C. §1983. The action was based upon a one day suspension of the petitioner from class, for the admitted use of profane and abusive language on the school's premises.

Petitioner arrived late at his classroom on the morning of January 5, 1979, and the teacher, Willis, directed him to obtain a late pass from the Dean's office - as, to petitioner's knowledge, was customarily required (3, 14, 20-21).* Willis abruptly closed the classroom door, and petitioner thereupon called Willis a "prick" (19, 48-49). Petitioner obtained a pass, returned, was admitted to the classroom, and was allowed to stay "to the end of the class" (18, 49). Willis then asked petitioner to

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* Unless otherwise indicated, numbers in parentheses refer to pages in the Joint Appendix.

go with him to the Dean's office (14-15, 18, 49).

The school principal, as alleged in petitioner's complaint, "imposed a one day suspension from school upon [petitioner]* * * for the use of 'foul language' in violation of the established school rule against the use of profanity or abusive language [student handbook]'" (4-5, 15). As is also conceded in the complaint (2-3), the pertinent sections of the Education Law of the State of New York empowered the school board "to establish rules and regulations concerning the order and discipline of the schools," and "to suspend students from school who are insubordinate or disorderly."

The school's notice of suspension, signed by both the Dean and the principal, was sent to petitioner's father, and it offered him "an informal conference" if he desired (34). Thereafter, the principal reminded petitioner's father that there had been two telephone conversations with him, in which the reason for the suspension has been explained (37). The principal also stated that, although the father had "requested no hearing at that time," the

principal "will be most happy to meet with [him] on Wednesday or Thursday morning of this week" (Id.).

Apparently, petitioner's father never accepted the invitation, and the principal wrote him that he (the principal) had completed his review and had "determined that our school procedures are in compliance with district policy and regulations issued by the State Commissioner of Education" (38). The principal, nevertheless, expressed a desire for "mutual cooperation in helping [petitioner] along a successful path" (Id.).

The district court, in granting defendant's motion for summary judgment, held:

> "mere disciplinary acts of a school administrator or faculty member are not matters for a federal court's review absent evidence of conduct which rises to the level of violation of specific constitutional guarantees." (50)

The Court of Appeals unanimously affirmed that judgment (Petition, Appendix C).

ARGUMENT

THE DECISIONS BELOW WERE CLEARLY CORRECT, AND THERE IS NO GROUND WHATSOEVER FOR THE GRANTING OF CERTIORARI

The Judgment Below Was In Complete Accord With The Decisions Of This Court

In the leading case of Wood v. Strickland, 420 U.S. 308, 326 (1975), this Court held:

> "It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion. * * *
>
> " . .§1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations. The system of public education that has evolved in this Nation was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees."

In Epperson v. Arkansas, 393 U.S. 97, 104 (1968), the Court similarly held:

> "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate

basic constitutional values."

It is actually unnecessary to invoke the doctrine of Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), upon which the petition extensively, but irrelevantly, discourses (pp. 12-16), but that decision does afford additional support for the judgment below. It held:

> "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words * * * are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality....." (pp. 571-72).

This principle is all the more applicable in the instant case, where the profane insult was uttered by a high school student to his teacher on school premises, and his sole grievance is that he was suspended from class for the minimum period of one day, in accordance with established school regulations.

Fenton v. Stear, 423 F. Supp 767 (W.D. Pa. 1976), also discussed in the petition (p. 12 et seq.), is precisely in point, and

case all of the facts were carefully considered by both courts (Petition, Appendices A and C), and they clearly demonstrated the absence of any cause of action. Petitioner's accusation that the Second Circuit deliberately applied "a double standard" to this case (p. 11) is outrageous and contemptuous.

Petitioner's cited Thonen v. Jenkins, 491 F.2d 722 (4th Cir., 1973) and Thomas v. Board of Ed., Granville Cent. Sch. Dist., 607 F.2d 1043 (2nd Cir., 1979), cert. den., 48 L.W. 3536 (2/19/80) (Petition, p.12), both involved true expressions of speech contained in student publications, not offensive obscenities, and indicate no "conflict" whatsoever with the decision below. In Thonen, the court, citing Healy v. James, 408 U.S. 169, confirmed the right even of a university to "'enforce regulations as to the time, place and manner of speech'" (491 F.2d at 723). In Thomas, supra, the court citing Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 509 (1969), carefully distinguished cases which, like the instant one, "involved expression within the school itself," where the courts are most reluctant to intervene (607 F.2d at 1050).

CONCLUSION

The decision below was clearly correct. Furthermore, there is not the slightest ground for the granting of certiorari, since the entire claim is trivial, the "Questions Presented" have been concocted, the courts below acted correctly and soundly, and the decision below does not conflict, but is in full accord, with all prior decisions, in this Court as well as all courts of appeal.

This petition should be denied, with costs.

Respectfully submitted,

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June 1980

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1936

ANTONIO MARENO, Jr., a minor 16 years of age, by his mother and next friend, Kathlene C. Mareno,

Petitioner,

vs.

JAMES M. WALKER, individually and as Principal of Lakeland Senior High School, Shrub Oak, New York, and ROBERT F. WILLIS, individually and as a Substitute Homeroom Teacher in Lakeland Senior High School, Shrub Oak, New York,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE PETITIONER

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IN THE
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Respondents.

On Petition for a Writ of Certiorari
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REPLY BRIEF FOR THE PETITIONER

STATEMENT

Petitioner recognizes in respondents' brief some of the same arguments they advanced in their opposing brief before the

Second Circuit panel, all of which have been answered seriatim in the reply brief (at pages 2 through 8) filed below by petitioner. Consequently, petitioner will not burden this court with a repetition of petitioner's rejoinder there, since these arguments are not addressed to the questions presented in the petition.

THE CASE FOR ADICKES [1]

Respondents' condemnation of Question No. 1 in the petition is made in poor grace. Granted that petitioner's counsel only discovered Adickes and its progeny subsequent to the filing of the briefs before the Second Circuit panel, it requires only a reading of Point I of petitioner's main brief there(pages 3 and 4) to ascertain that petitioner placed maximum importance upon the district court's factual findings in the case. This was enough to invoke Adickes. Cf. International Union of Elec., Radio and Mach. Workers, AFL-CIO, Local 790 v. Robbins & Myers, Inc., 429 U. S. 229 at 235, footnote 7(1976). Indeed, in Rodriquez [2] (about which respondents make no comment) the panel did not require even that much of a signal from Rodriquez before invoking the Adickes principle sua sponte.

1/ Adickes v. Kress & Co., 398 U.S. 144 (1970)

2/ Rodriquez v. Bd. of Ed., Eastchester Union Free Sch. Dist., et al, 616 F.2d 2701(2nd Cir.,1980)

Moreover, petitioner's counsel was not admitted to practice at the Second Circuit bar, and, therefore, had to obtain leave of court to argue the appeal pro hac vice. It would hardly have been worth the effort for counsel merely to devote a 10 minute argument time exclusively to matters already covered in the briefs.

Most, if not all, of the panel's questions were directed to petitioner's counsel, while respondents' counsel, for the most part, had merely to sit back, intone his prophesy of doom(his chief weapon all along), and unleash an "undifferentiated fear" of what First Amendment sanction for petitioner's reactionary verbal thought would portend for the public schools. Consequently, respondents could not have known of the frustration experienced by petitioner's counsel in not being able to gain the panel's ear where it counted most.

While, undoubtedly, any appellate court has the prerogative and the duty to interrupt arguing counsel in order to get at the heart of the matter, seldom, if ever, has that prerogative been employed in a manner which has the effect, at least, of leading counsel away from the heart of the matter, which, in this case, was the district court's evidentiary findings. What the case came down to was the legality of the district court's fashioning of the strongest factual predicate, to say the least, for application of the Chaplin-

sky perspective, as against that court's obligation to fashion the weakest factual predicate for that purpose.

In fact, one of the judges[believed to be Brieant, J.] observed, "Two wrongs don't make a right." 3/, thus clearly acknowledging the culpability of respondent Willis in the affair. This observation, added to that of another judge[Meskill, J.] to the effect that there are times when one just has to be silent, plainly announce that a majority of the panel was exacting from a 16 year old schoolboy the wisdom of a Solomon under circumstances not required even of a junior high school principal facing a similar stress. See, Appeal of Coates, 47 Wash.2d 51, 287 P.2d 102(1955).

It is deeply regretted, and certainly

3/ This observation marks the first time anyone connected with the case either on an administrative or a judicial level acknowledged any wrongdoing on the part of respondent Willis except such as may be implicit in Dean Sarkissian's referral of the matter back to respondent Walker. It is significant because, while most well meaning parents will accept objective disciplining of their children by school administrators and teachers, few will tolerate the deliberate pushing around of their children by maladjusted school officials once they recognize it as such.

injurious to petitioner's reputation as a human being whose budding life remains largely in front of him, that these judges did not disassociate themselves from the factual findings of the district court. For where is the virtue in begrudging petitioner his rightful place in history as the victim of aggression in order to perpetuate the myth that there are no bad teachers -- only bad students, when, for reasons announced infra, all of Lakeland now know otherwise?

At the very least the abortive disposition of the case in medias res has deprived petitioner of the opportunity to ascertain through discovery on the damages issue if Dean Sarkissian ever informed respondent Walker of his disenchantment with respondent Willis' behavior toward students which he candidly imparted to petitioner and his father. Cf. Thonen v. Jenkins, 517 F.2d 3, 6(4th Cir.,1975).

THE CASE FOR THE STUDENT

Today, Lakeland High School is without a principal, facing the upcoming 1980-81 term which will be petitioner's senior year. After 13 years as principal of the 1350 student high school respondent Walker suddenly resigned the position to take a job as principal of a 550 student high school in North Salem[another school district in the county]. And, according to an article appearing in The Evening Star on May 1,

1980, on page 3[a daily newspaper published in Peekskill, New York, and circulating in the Lakeland School District area], respondent Walker gave as his reason for resigning his post at Lakeland, "I find the smaller size more manageable, and it will be a good change for me."

In the aftermath of Walker's resignation school board member Martin Promisel is reported on page 15 of the June 5, 1980 issue of the same newspaper to have done some finger pointing at problem schools in the district which included Lakeland High School, while noting that the principalship in Lakeland High School[there are two high schools in the district] is "the toughest in the district." In discussing problem schools which had turned around, Promisel said, "I hope with the right leadership Lakeland High School can do the same." One of the problems he pointed to at Lakeland High was "staff not properly supervised."

Petitioner finds these news articles to be a fitting post script to his argument before the Second Circuit panel that the issue in the case is more a case of teacher unfitness, and less a case of student misbehavior -- calling attention to the Second Circuit's caveat in James 4/ [restated in

4/ James v. Board of Education of Central Dist. No. 1, Etc., 461 F.2d 566(2nd Cir.,1972), cert. den., 409 U. S. 1042 (1972)

Russo 5/] that the courts " . . . cannot tolerate undisciplined, coercive, intimidating or disruptive activities on the part of teachers . . . which threaten the essential functions of our schools . . .." However, in handling petitioner's case, Respondent Walker, unaccustomed to his statutory responsibilities for student discipline by reason of any personal involvement, was suddenly thrust into the vortex of the dispute by Dean Sarkissian in view of the teacher's complicity, was ill equipped to deal with it, panicked, and, as a result, gave short shrift to both petitioner and his parents.

It's as though Walker never heard of Wood v. Strickland, 420 U. S. 308(1975), and of the administrative responsibilities it imposed upon him as the recipient of a portion of the school board's disciplinary authority -- responsibilities which were honored more in the breach than in the observance insofar as concerns safeguarding petitioner's rights. In fact, for any school district lawyer to contend at this late date, in the aftermath of Tinker 6/, that restraints on student speech(or, as in this case, verbal thought, in view of petitioner's lack of intent to communicate)

5/ Russo v. Central Sch. Dist. No. 1, Towns of Rush, Etc.,N.Y., 469 F.2d 623(2nd Cir.,1972), cert. den., 411 U.S. 923(1973)

6/ Tinker v. Des Moines Independent Community School District, 393 U.S. 503(1969)

in the school environment do not directly and sharply implicate First Amendment values, and, in the aftermath of Goss 7/, that a one day suspension of a student from school is a trivial punishment, is certainly not likely to have counseled the principal at all with respect to administrative and disciplinary responsibilities laid down in Wood v. Strickland, supra.

With Walker gone the future augurs well for students at Lakeland High School, as it is highly unlikely that respondent Willis will find a safe haven in Walker's successor[whether stemming from inexperience or a camaraderie of sorts] to support his free wheeling sorties among the students now that it is crystal clear that the school board, with whom petitioner never had any quarrel, is as much concerned with teacher fitness in Lakeland High School as it is in student discipline there. Cf. Bott v. Bd. of Ed.,Deposit Cent. Sch. Dist., 41 N.Y.2d 265, 360 N.E.2d 952(1977).

However, for the present, and from the standpoint of this case, since a corrective disposition should have been achieved below under the guidance of James, but was not, the Second Circuit's caveat in James must be viewed as being mere sabre rattling insofar as it may be viewed as offering students any protection against disruptive teachers. For a stronger case for the application of the James caveat is not likely to be found than that presented by petitioner's case.

7/ Goss v. Lopez, 419 U.S. 565(1975)

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted

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July, 1980